Court to rectify the position, as for instance, by applying by summons in chambers for particulars of the alleged demand.

As to the first point I can find nothing in the record to suggest either that the plaintiff did not know the case he had to meet or that he had no fair opportunity of meeting it. If further witnesses were thought necessary (as counsel for the appellant now suggests) the necessary further time could have been applied for. As it was, the appellant had two clear months between the hearing in chambers, when the question of demand was first raised, and the hearing in Court.

The arguments for the appellant are in my view disposed of by the points put forward by Mr. Bostock-Hill who appeared for the respondents. In the first place he pointed out that the issue as to whether or not there was a demand was clearly placed on the record in that part of the appellant's second affidavit quoted earlier in this judgment; and secondly he contended that the fact that a party's case might have been better conducted in the Court below is not a good ground of appeal. In support of this proposition he cited the case of *Sanders v. Sanders*[2] where Jessel, M.R. said in his judgment "That he might have shaped his case better in the Court below is no ground for leave to adduce fresh evidence before the Court of Appeal." In the same way it is no ground for asking for a re-hearing in order to adduce fresh evidence in the Court below.

For these reasons I thought the appeal ought to be dismissed.

In view of the criticisms made from the Bar upon the procedure laid down by Section 11 of the Debtor and Creditor (Occupation Period) Ordinance, 1948, I think it desirable to add that in my opinion procedure by originating summons is, in many cases, quite unsuitable for dealing with some of the matters that fall to be decided upon applications under the section. In the particular case before us the procedure laid down was, as it turned out, adequate to the occasion; but other cases before the Court are leading, and are likely in the future to lead, to considerable difficulties. Where disputed questions of fact, such as duress or demand for payment, have to be decided it would, in many cases, be not only far easier but also in the long run more expeditious to proceed by action or suit with proper pleadings so that the issues can be clearly defined. Consideration might, I think, be given to the advisability of an early amendment of the Ordinance providing that the relief under section 11 should, in contested cases, be sought by action or civil suit.

Appeal dismissed.

TAN CHOON CHUAR AND ANOR.
v.
PUBLIC PROSECUTOR.

[Court of Appeal (Willan, C.J., Pretheroe and Russell, JJ.) July 9, 1950]

[F.M. — Criminal Appeal No. 39 of 1950]

Criminal appeal — Application to call further evidence — Statements taken from persons after trial of the appellants suggesting that appellants were wrongly convicted — Emergency Regulations, Regulation 4(1)(b) — Courts Ordinance, 1948, s. 30.

In this case an application was made to call further evidence at the hearing of the appeal of the appellants who had been convicted under Regulation 4(1)(b) of the Emergency Regulations, 1948. It appeared that after the trial of the appellants, the police took statements from two Chinese. In them, both these Chinese alleged that the two appellants had been wrongly convicted and that it was other Chinese named in the statements who were the real offenders.

Held, (1) that the application must be refused as the Court would not be an appropriate tribunal to hold the enquiry that would be necessary to arrive at a decision whether the statements were probably true; (2) that such an enquiry could more properly be taken by the proper executive authority.

Case referred to :—

(1) *R. v. Rowland* 32 Cr. App. R. 29.

MOTION for leave to call further evidence.

K. K. Benjamin for the appellants.

W. M. McCall for the respondent.

The facts of the case sufficiently appear from the judgment of the Court delivered by :—

Willan, C. J. : — By a Notice of Motion Mr. Benjamin, on behalf of the two appellants, applied under section 30 of the Courts Ordinance, 1948, for leave to call further evidence. The facts are that the first appellant was convicted under Regulation 4(1) (b) of the Emergency Regulations, 1948, for being in possession of a hand-grenade near the International Hotel, Batu Road, Kuala Lumpur, on the 26th of April, 1950. The second appellant was convicted under Regulation 5(1) of the said Regulations for consorting with the first appellant at the same time and place. The hand-grenade was thrown at the International Hotel and exploded outside it. Both the assessors returned opinions of guilty, with which the learned trial Judge agreed. Accordingly both the appellants were convicted and sentenced to death on the 20th of June, 1950. They have appealed to this Court.

After the trial, on the 21st, 23rd and 24th June, 1950, the police in Kuala Lumpur took statements from two Chinese, one of whom is in custody, and the other is a police agent. We have perused these statements. In them, both these Chinese allege that the two appellants have been wrongly convicted and that it was other Chinese named in the statements who are the real offenders in the offence of throwing the hand-grenade near the International Hotel on the day in question. There is no doubt that if the statement of one of these two Chinese is true, it contains sufficient incriminating evidence for him to be charged under Regulation 5(1) of the Emergency Regulations, 1948, for the offence of consorting, which is an offence for which the maximum punishment is death. These statements were handed to the Public Prosecutor by the police on the morning of the 26th of June, 1950. On the same morning the Public Prosecutor handed them over to Mr. Benjamin, Counsel for both appellants, who prompty filed the Notice of Motion seeking leave to call further evidence. Before handing over these two statements to Mr. Benjamin, the Public Prosecutor took little or no action to ascertain their probable truth. In our view, on the authority of *R. v. Rowland*[1], to which we make reference later, the Public Prosecutor would have been well advised to have made such enquiry before deciding what should be done with the statements.

It is clear from paragraph 6(g) of Mr. Benjamin's affidavit in support of the Motion, that if leave were given to call further evidence such evidence would extend beyond the calling as witnesses of these two Chinese.

We refused the application to call further evidence on the authority of *R. v. Rowland, supra.* In that case the Court of Criminal Appeal in England refused leave to call the evidence of a man named Ware, who had made a statement confessing to the murder of which Rowland had been convicted. As already stated, it is obvious that if we were to allow further evidence to be given, it would not stop at the evidence of these two Chinese who made the statements, it would only be the beginning of an enquiry which would involve calling many witnesses. For instance, in all probability the prosecution would seek to check up the movement of the two Chinese who made the statements to assist in deciding whether those statements are probably true, and that, in itself, would involve further witnesses. In our view there is no way of knowing how many witnesses would have to be called to give further evidence before this Court or before the trial Judge. By section 30(3) of the Courts Ordinance, 1948, when further evidence is taken by the trial Judge, it must not be taken in the presence of the assessors.

As stated in the report of the case of *R. v. Rowland, supra,* this Court of Appeal would not be the appropriate tribunal to hold such an enquiry nor in our opinion would the trial Judge. At page 34 of the report of that case the following passage appears :—

> "If we had allowed Ware to give evidence before us, and he had persisted in his confession of guilt, the Court would have been compelled to form some conclusion as to his guilt or innocence and to express that opinion in open Court. In effect, therefore, the Court would have been engaged in trying not only Rowland but also Ware, and thereby usurping the function of a jury. It is true that we should not be empowered to pronounce finally upon the issue of the guilt or innocence of Ware, who as the result of our judgment might have to stand his trial by jury on this charge of murder. In that event the finding of this Court could not fail to be prejudicial to his chance of an impartial trial."

The same considerations apply in our case. If we had allowed further evidence to be called, this Court would have been compelled to form some conclusion as to the guilt or innocence of the one Chinese who made an incriminating statement, and also of the other Chinese named in the statements. As a result of our judgment the Chinese who made the incriminating statement and the other Chinese named in the statements might have to stand their trial for offences under the Emergency Regulations, 1948. In that event the finding of this Court could not fail to be prejudicial to their chance of an impartial trial.

At page 35 of the report of *R. v. Rowland, supra,* the following passage appears :—

> "Finally, we are not unmindful of the fact that there exists an authority in the person of the Home Secretary, who has far wider powers than those possessed by this Court, who is not bound as we are by rules of evidence, and who has all the necessary machinery for conducting such an enquiry as is here asked for."

In our view similar action should be taken in this case by the proper Executive Authority on the advice of the Attorney-General.

Mr. McCall, who appeared for the Public Prosecutor, supported Mr. Benjamin's application to call further evidence on the ground that the Public Prosecutor would prefer a judicial enquiry. In the light of the decision in *R. v. Rowland, supra,* we consider the attitude taken by the Public Prosecutor in supporting Mr. Benjamin's application to be wrong.

After this application was refused, Mr. McCall stated that in the event of the appeal being dismissed, the Attorney-General would advise the appropriate Executive Authority to hold an enquiry. This, in our view, is the right action to take, and we trust that such an enquiry will be held as speedily as possible.

Application dismissed.